

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DAVID PRICE D/B/A DAVID PRICE</b>	:	
<b>PHOTOGRAPHY</b>	:	DETERMINATION
	:	DTA NO. 815745
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 1992 through May 31, 1995.	:	

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Petitioner, David Price d/b/a David Price Photography, 4 East 78<sup>th</sup> Street, New York, New York 10021-1715, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1992 through May 31, 1995.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on December 4, 1997 at 10:15 A.M., with all briefs to be submitted by March 23, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared by Soloway, Goldstein, Silverstein & Co. (Herman J. Soloway, CPA). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

***ISSUE***

Whether sales of medical photographs produced by petitioner for physicians are sales of tangible personal property or taxable services subject to sales and use taxes pursuant to Tax Law §§ 1105(a) or (c).

***FINDINGS OF FACT***

1. David Price d/b/a David Price Photography (“petitioner”) is engaged in the business of medical photography and provides medical photographs to plastic and reconstructive surgeons which are used as a guide in the performance of the surgeon’s diagnosis and surgical procedures. The photographs are very specific and highly detailed portrayals of various parts of the exterior anatomy of patients about to undergo plastic or reconstructive surgery. The photos are used only for this purpose.

The photographs are generally requested by the plastic surgeon in written instructions which are given to the patient and delivered to petitioner at the time the photographs are taken. Print film is developed by petitioner or his employees at petitioner’s studio, while film used to produce slides is sent to an outside processor for development. Petitioner retains no interest in the product or residual product, i.e., a negative, once prints or slides are produced and delivered to the requesting surgeon, except a record of the patient for whom petitioner performed the service. The patient has responsibility for payment to petitioner for the photographs, by insurance or otherwise.

2. The Division of Taxation (“Division”) performed a detailed audit of petitioner’s business for the period June 1, 1992 through May 31, 1995. It concluded that petitioner was engaged in sales of tangible personal property pursuant to Tax Law § 1105(a) and engaged in the sale of services subject to sales tax pursuant to 20 NYCRR 527.4 and Tax Law § 1105(c)(2). The services found to be taxable were producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property. During the audit, sales records were deemed adequate, and gross

sales were found to be in substantial agreement with sales reported on petitioner's Federal income tax and sales tax returns.

3. The Division issued a notice of determination dated May 28, 1996, assessing additional sales and use taxes due in the amount of \$29,526.89, plus penalties and interest in the amounts of \$8,352.29 and \$9,523.37, respectively, for a total of \$47,402.55, for the period June 1, 1992 through May 31, 1995.

4. Petitioner filed a timely request for a conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conference was conducted by BCMS on November 12, 1996, and a Conciliation Order (CMS No. 156071) dated January 3, 1997, was issued sustaining the statutory notice.

5. Petitioner filed a timely petition with the Division of Tax Appeals challenging the assessment described herein, and the instant proceeding ensued.

6. David Price, the owner and sole proprietor of the business, testified at the hearing in this matter. Mr. Price has been a professional advertising photographer for 25 years, and began the specialized area of medical photography in the early 1980s. At that time, petitioner sought advice from his accountant and tax attorney, Mr. Soloway, who expressed the opinion that petitioner's service and sales at issue herein were not taxable. Petitioner followed up this advice with calls to the Taxpayer Services and the Technical Services bureaus of the New York State Department of Taxation and Finance, during which he was again informed that his services were not taxable. In addition, during an audit of prior tax years, which took place in 1985 or 1986, petitioner was praised for good record keeping and was given every indication that his sales tax records and payments were in order. Petitioner took the opportunity to discuss with the New

York State representative his more recent endeavor of medical photography and was again provided the opinion that the transactions were not subject to sales tax.

7. After the BCMS conference, at which time the audit findings concerning this matter were sustained, petitioner began collecting sales tax in the manner suggested as proper by the Division.

8. Petitioner introduced statements from 21 physicians who all stated that they require the specialized medical photographs at issue herein for use as a diagnostic tool in their practices of plastic and reconstructive surgery. The doctors deem the photographs essential to them in assessing the needs of the patients facing surgery and in the course of the surgical procedures. In the opinion of each physician, the photographs would serve no purpose other than as a requirement for the surgical procedure.

9. Petitioner was familiar with his competition in the field of medical photography and was aware that Don Allen Studio maintained a Manhattan presence. Numerous surgeons who previously used the services of Don Allen Studio sought petitioner's services, mostly as a matter of geographic convenience.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

10. Petitioner disputes the applicability of the case cited by the Division (***Matter of Don Allen Studio***, State Tax Commission, September 8, 1982 [TSB-H-(121)S]), since, unlike ***Don Allen Studio***, petitioner did not maintain possession of the negatives. Petitioner maintains that the medical photographs he takes are comparable to the process of magnetic resonance imaging ("MRI"), where a physician views the results of a "picture," interprets the same and uses the results to perform medical or surgical procedures. Petitioner believes, as with MRIs, the medical photographs should be deemed nontaxable.

11. The Division contends that petitioner's sales are taxable pursuant to provisions of the Tax Law as sales of tangible personal property, and cites to *Don Allen Studio, Inc. (supra)* as additional support for its position.

### ***CONCLUSIONS OF LAW***

A. The Tax Law imposes sales tax upon receipts from the sale of tangible personal property (Tax Law § 1105[a]) which includes, among other items, photographs (20 NYCRR 526.8). Thus, sales of petitioner's photographs clearly come within the purview of Tax Law § 1105(a) as the retail sale of tangible personal property and are subject to sales tax.

B. The Tax Law additionally imposes tax upon the receipts from the sale of certain services (except when they are for resale, which is not applicable here) (Tax Law § 1105[c]). Such services include "producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which such services are performed" (Tax Law § 1105[c][2]). If the film is considered as being indirectly provided by the patient, though this may be a strain on the definitional requirement, the developing of the same by petitioner into photographs is a taxable processing service (Tax Law § 1105[c][2]; 20 NYCRR 527.4[d]).

C. Petitioner's sales of medical photographs are subject to sales tax unless they meet an exemption provision. Although petitioner did not cite to a specific provision of the Tax Law to support an exemption from sales tax, it appears as though petitioner has attempted to seek the exemption pursuant to Tax Law § 1115(a)(3), which exempts from sales tax the following:

Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, *medical equipment (including component parts thereof) and supplies required for*

*such use or to correct or alleviate physical incapacity*, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein or medical equipment (including component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation (emphasis supplied).

The term “medical equipment” is defined by regulation as follows:

Medical equipment means machinery, apparatus and other devices (other than prosthetic aids, hearing aids, eyeglasses and artificial devices which qualify for exemption under section 1115[a][4] of the Tax Law), which are intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings (20 NYCRR 528.4[e]). Medical supplies must be intended for the same purposes as equipment (20 NYCRR 528.4[g]).

Although the photographs might be construed, under a very broad interpretation, as devices which are intended for use in the correction or alleviation of physical incapacity, petitioner has not carried his burden of showing that the plastic and reconstructive surgery for which the photographs were provided were to solve problems of the sort described in the statute and regulations, i.e., physical incapacities, contrasted to elective procedures primarily performed for cosmetic reasons (Tax Law § 1115[a][3]; 20 NYCRR 528.4[e], [g]; Tax Law § 1132[c]). Accordingly, petitioner has not shown entitlement to an exemption for medical equipment.

D. In support of the assessment, the Division also relied upon *Matter of Don Allen Studio, Inc. (supra)* which addressed the same primary issue, i.e., whether petitioner’s medical photographs were considered tangible personal property subject to tax pursuant to section 1105(a) of the Tax Law, and resolved that and related issues in favor of the Division. Although the Division of Tax Appeals is not bound to rely upon decisions of the former State Tax Commission, the Tax Appeals Tribunal has stated that such decisions, emerging from a body of coordinate jurisdiction, are entitled to respectful consideration (*Matter of McDonnell Douglas*

*Corporation*, Tax Appeals Tribunal, January 8, 1998, citing *Matter of The Racal Corp. & Decca Elecs.*, Tax Appeals Tribunal, May 13, 1993). Given the nearly identical facts, the same professional business and the same legal question, reference to *Don Allen* is appropriate. Furthermore, although the legal discussion in the State Tax Commission case is brief, an analysis of the same issues by application of the Tax Law and the regulations, leads to the same reasonable conclusion as in *Don Allen*. Additionally, petitioner testified that his work is substantially the same as that of Don Allen Studio, which is also located in New York City. This provides a further basis to conclude that petitioner's sales are subject to sales tax, consistent with *Don Allen*. Petitioner attempts to distinguish *Don Allen* based on the fact that petitioner does not retain title to the negatives. An analysis of the *Don Allen* case, however, indicates that this factor was irrelevant to the decision.

E. The Division refutes what it perceives to be a potential estoppel argument made by petitioner. Since it does not appear to me that petitioner raised such argument, directly or indirectly, such discussion will not be addressed.

F. Tax Law § 1145(a)(1) imposes a penalty upon taxpayers who fail to timely file a return or timely pay any tax under Articles 28 and 29. Under Tax Law § 1145(a)(1)(iii) a penalty may be waived if such failure or delay was due to reasonable cause and not due to willful neglect. In determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of the taxpayer's efforts to ascertain the proper tax liability (20 NYCRR 536.5[d][2]). In this case, petitioner provided credible testimony regarding his efforts to ascertain the proper sales tax treatment for his business of medical photography from his tax attorney and accountant, the Division's taxpayer services, and an auditor of the Division who conducted a separate review of petitioner's books and records. The advice he received from

these sources was the same, that the transactions surrounding his services were not taxable. This fact, coupled with the fact that petitioner began collecting sales tax after the BCMS ruling that the transactions were taxable, shows that petitioner's failure was due to reasonable cause and not due to willful neglect. Accordingly, the penalties in this matter are canceled.

G. The petition of David Price d/b/a David Price Photography is granted to the extent set forth in Conclusion of Law "F" and is otherwise denied, and the notice of determination dated May 28, 1996 is hereby sustained.

DATED: Troy, New York  
September 23, 1998

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE